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Supreme Court of the United States

October Term, 1967

No. [redacted] 44

WILLIAM SKINNER, AUGUST R. GUELDNER AND ALTON J. CHABBONNET,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

Petition for Writ of Certiorari to Review Decision of the Supreme Court of Louisiana in State of Louisiana vs. William Skinner, et al., No. 48,445 of the Docket of said Court.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, William Skinner, August R. Gueldner and Alton J. Charbonnet, pray that a writ of certiorari issue to the Supreme Court of Louisiana to review the judgment of that Court rendered on Monday Nov. 7, 1967 and rehearing denied on December 11, 1967. Said judgment sought to be reviewed is the judgment on rehearing wherein the Court recalled its earlier judgment of reversal and affirmed the conviction and sentences of petitioners in a narcotics prosecution, said sentences ranging from ten to fifty years. The proceedings below are entitled:

"State of Louisiana vs. William Skinner, August R. Gueldner and Alton J. Charbonnet, No. 48,455" of the Docket of the Supreme Court of Louisiana.

CITATIONS TO THE OPINION BELOW.

The Opinion below is reported in 204 So. 2d 370.

JURISDICTIONAL STATEMENT.

Petitioners were jointly tried and convicted in a prosecution involving alleged sale and possession of marijuana in the Criminal District Court for the Parish of Orleans, State of Louisiana and said conviction and sentence was, after an initial reversal, affirmed on rehearing by a divided State Supreme Court. Said final judgment, i.e., the affirmance on rehearing, was rendered by the State Supreme Court on Nov. 6, 1967 and an application for second rehearing was denied on December 11, 1967. Sentences imposed range from 10 to fifty years, your petitioner Alton J. Charbonnet, a 33 year old negro, receiving the latter sentence as a second offender. (Vol. 1, R. 19.)

The statutory provision relied upon as conferring jurisdiction upon this Court for the issuance of certiorari is Title 28, United States Code, Sec. 1257(3). The Supreme Court of Louisiana is the highest Court of the State and the judgment herein complained of is a final judgment.

QUESTIONS PRESENTED.

1. Were the constitutional rights of petitioners to due process and equal protection of the laws denied by reason of the fact that one of your petitioners, Alton J. Charbonnet, was neither present nor represented by counsel during the hearing of certain preliminary motions involving the taking of extensive evidence affecting the entire case?

2. Were petitioners denied due process and equal protection of the law by reason of the fact that, although the information contained no charge of conspiracy, the trial judge, over objection, gave a charge on the entire law of conspiracy?

3. Were petitioners denied due process of law by reason of the fact that counsel for Skinner and Gueldner, Mr. Gill, was ill and exhausted, the trial Judge nevertheless held an all night session climaxing at nearly 3 a.m., reconvened at 9:30 to finish the case, and two of the jurors were asleep during part of the trial?

STATUTES INVOLVED.

1. The due process clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT.

Your petitioner Alton J. Charbonnet, a 33 year old negro, was charged jointly with petitioners Skinner

and Gueldner in an information charging two counts relative to marijuana: sale and possession. At the time of trial there was also pending against all three petitioners a charge of conspiracy relative to the same narcotics transaction *but said case was not tried or in any way consolidated with the instant case.* Nevertheless, as noted below, the trial judge evidently confused the instant case with the conspiracy case. This is indicated by the fact, as noted hereafter, that he referred to the instant case, during trial of a preliminary motion, as one involving *conspiracy* (Vol. 1, R. 64) and *he finally* gave a full blown charge on conspiracy, though none was charged.

Such confusion during the trial, and during handling of preliminary motions, is further indicated by the failure to have defendant (petitioner) Charbonnet even present in Court during the trial of certain motions vitally affecting his case.

Your petitioner William Skinner was a fairly prosperous dealer in second hand automobiles with two outlets for retail sales in New Orleans. Gueldner was his employee who assisted in sales and was generally active in the business. State undercover narcotic agents were first seeking to make a case against another employee, not here involved and, for that purpose, they infiltrated Skinner's automobile business by virtue of automobile loans which one agent controlled through a "front" as manager of a financing agency. (Vol. 2, R. 680.) Using his leverage as mana-

ger of the finance company, vital to Skinner's business, this agent in disguise first began to probe his influence on Skinner by first getting the latter to loan or give him money for betting at the race track. (Vol. 2, R. 456.) Later, the same agent, probing still further the extent of his influence upon Skinner, persuaded the latter to obtain dates with women for him. Finally, having found Skinner willing and eager to please, the State contends that the agent got Skinner to put him into contact with Charbonnet for the purpose of obtaining some marijuana. (Vol. 2, R. 420.)

The information charged a single transaction on May 21, 1965. (Information, Vol. 1, R. 22.) Both the count for possession and the count for sale involved the same $20.00 worth of marijuana in a matchbox. (Vol. 2, R. 422.) For the purpose of showing system or intent, however, the State was permitted to offer proof of an entirely separate transaction *a week later,* involving another sale of marijuana on May 28, 1965, plus another sale, later the same date, involving heroin, *and in which defendant Charbonnet alone was allegedly directly involved.* The foregoing issues are not briefed herein, except collaterally, and insofar as they involve the error of giving the conspiracy charge where no conspiracy was charged in the information. The above information is furnished here merely as background to illustrate the overall nature of the case.

ABSENCE OF CHARBONNET AND LACK OF REPRESENTATION BY COUNSEL.

Bill of Exceptions No. 35 (Vol. 2, R. 388) relates to the denial of a motion for new trial because defendant Charbonnet, although a co-defendant, was neither present nor represented by counsel during the hearing of certain important preliminary motions vitally affecting his case.

The minute entries in this case reflect that on August 26, 1965 all three defendants were arraigned together and all pleaded not guilty. (Vol. 1, R. 1.) (The date "Aug. 26, 1966" here is an obvious clerical error.) The same entry notes that defendants Skinner and Gueldner were given ten days in which to file technical pleadings and defendant Charbonnet was given the *same delay to determine counsel. Thus, he was not even represented by counsel at his initial arraignment.*

Charbonnet, an indigent negro, was at first unable to obtain counsel and an additional delay was granted. On Sept. 20, 1965 the Court appointed Mr. Monie as counsel for Charbonnet. (Vol. 1, R. 2.)

On Sept. 21, 1965, Mr. Gill, as counsel for Skinner and Gueldner filed a motion for bill of particulars, motion for preliminary examination, a motion to quash and a motion to quash the search warrant. (Vol. 1, R. 2.)

The case did not go to trial until the following year, on March 21, 1966. Meanwhile defendant Charbonnet was supposedly represented by a succession of Court appointed counsel, one of whom died. (Vol. 1, R. 4.) During this lengthy period in which Charbonnet was nominally represented by Court appointed counsel:

(a) He was never present at the trial of the many motions noted above, vitally affecting his case;

(b) The minutes fail to reflect that he was ever represented by counsel at the trial of these important motions; and

(c) He was never even notified of the trial of these motions, his counsel were never so notified and Charbonnet himself languished in jail during this period, being unable to make bail.

The motions for a bill of particulars, plea of entrapment and motion to quash were heard, evidence taken and disposed of on September 28, 1965. (Vol. 1, R. 3.)

On Oct. 8, 1965 the minutes reflect that the motion for preliminary hearing was disposed of (Vol. 1, R. 4) and it was in this connection that the Court, in holding that a prima facie case had been made out so as to *hold the three defendants for trial,* held that a case for conspiracy had been made, *despite the fact that conspiracy was not charged in the instant case.*

Reference to a conspiracy, therefore, could only have related to a separate pending case. Significantly however, on this, as on the hearing of other motions noted above, the Court was making rulings which had a direct and vital bearing upon defendant Charbonnet, who was neither present nor represented during the extensive trial of such motions and who was not even notified that they were being held.

It was not until Jan. 18, 1966 that defendant was able to obtain employed counsel, Mr. Link. (Vol. 1, R. 5.) Said counsel immediately proceeded to request copies of the transcript of the proceedings in the many motions noted above and this request was granted. (Vol. 1, R. 5.)

As noted below, both the trial Court and the Supreme Court were later to justify this complete ignoring of defendant Charbonnet during the trial of the many preliminary matters on the theory that:

(a) The motions were filed by counsel for the other two defendants and not on behalf of Charbonnet; and (b) That furnishing counsel with a copy of the transcript of these proceedings cured all evils.

The extensive testimony taken in connection with the above motions, including the preliminary examination and motion to suppress covered some 47 pages of testimony. (The transcript of this testimony, through clerical oversight, appears in reverse order. The testimony in connection with the Oct. 8 hearing

commences at page 41 of Vol. 1 and that in connection with the Sept. 28 hearing commences at page 73 of the same volume.)

During the trial of two of these jointly heard motions, in which extensive testimony was heard, the trial Judge expressly noted the absence of defendant Charbonnet: (Vol. 1, R. 80)

BY THE COURT: "*** In the second count they are charged with—*three people are charged here*—Mr. Charbonnet, BUT HE'S NOT HERE BECAUSE HE NEVER ASKED FOR THIS HEARING—did wilfully *** etc." (Emphasis added.)

The failure of the Court to have defendant Charbonnet present at hearing of these vital motions, particularly during the preliminary hearing, was doubly prejudicial: First, it prejudiced the rights of defendants Skinner and Gueldner by depriving them of the benefit of having Charbonnet being present to hear what was being said by the State witnesses, particularly during the preliminary examination. Secondly, it prevented Charbonnet being on hand so as to hear what was being said against him at a time when he or his counsel could do something about it, i.e., exploit any "breaks" in the case.

This highly unusual procedure of attempting to try "piece meal" *a case tightly involving three defendants, leaving one out altogether,* was in direct violation of State constitutional safeguards, discussed be-

low, and violative of the rights of all defendants to due process under the due process clause of the 14th Amendment to the Constitution of the United States.

THE GIVING OF A CONSPIRACY CHARGE.

In its original opinion the State Supreme Court reversed the conviction and sentence on the sole basis that a charge of conspiracy had been given by the trial Judge, despite the fact that there was no charge of conspiracy whatever contained in the information. This error was covered in Bill of Exceptions No. 29 which appears at Vol. 2, R. 252 and the Per Curiam to this Bill Appears at Vol. 2, R. 356 et seq.

As will appear by the Court's Per Curiam, the trial Judge told the jury: (Vol. 2, R. 356)

"CONSPIRACY

"I charge you, gentlemen of the jury that a criminal conspiracy is defined to be a combination or agreement between two or more persons to do a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. It has been said that a criminal conspiracy is a partnership in criminal purposes."

At Vol. 2, R. 358, the Judge continued on this extensive conspiracy charge as follows:

"When a conspiracy is entered into to do an unlawful act, all persons engaged therein are responsible

for all that is done in pursuance thereof by any of their conspirators, until the object for which the conspiracy was entered into is fully accomplished.

"This responsibility is not confined to the accomplishment of the common design for which the conspiracy was entered into, but it extends to, and includes, collateral acts and incidental and growing out of the common design."

Specific objection was made to the giving of this sweeping charge of conspiracy in a case in which conspiracy was not charged at all. (Vol. 2, R. 252.)

The highly prejudicial effect of granting this conspiracy charge is developed below.

LONG HOURS, SLEEPING JURORS AND ILL AND EXHAUSTED COUNSEL.

Mr. Gill, counsel for defendants Skinner and Gueldner, was suffering from a severe case of diabetes and other ailments later described by his personal physician as making it physically impossible for him to work all night in trial. (Vol. 2, R. 338.)

Trial of the case had commenced at 10:30 a.m. and continued on, with the usual recesses until the State rested near midnight. Thereupon the following occurred: (Vol. 3, R. 604)

BY MR. DOLAN: The State at this time will rest its case, reserving the right to rebuttal.

BY MR. GILL: *Before asking for a recess.* I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.

BY THE COURT: YOU HAVE BEEN AFTER ME ALL DAY, MR. GILL. I've gotten tired of listening to you. I am going to see if we can't finish this case tonight. Go to work and see if we can't finish this case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'M SURE EVERYONE IS TIRED, ETC.

Thereupon, after a brief exchange Mr. Gill informed the Court that he was suffering from a "severe case of diabetes" (R. 605) which was later amply borne out by medical testimony of his personal physician, Dr. Morrison, on hearing of the motion for new trial.

Thereupon the Court replied "I know you have been ill" and added that "we have been having continuances on top of continuances" but generously allowed this 65 year old, weary diabetic a *THREE MINUTE RECESS.* (R.605.)

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please I respectfully request Your Honor declare a mistrial.

BY THE COURT: Request for mistrial is denied.

BY MR. GILL: Respectfully object and reserve a bill of exceptions.

BY THE COURT: You may have your bill.

BY MR. GILL: Respectfully request a recess.

BY THE COURT: The Court will be at recess for *three minutes.*

After denying the request for a recess the first night *and the motion for a mistrial made upon such denial* (R. 605) the Court then kept the Court going till about *THREE O'CLOCK THE NEXT MORNING.* (R. 687.)

The jury was then ordered back for 9:30 a.m. that same morning at which time they heard arguments, received instructions and retired at 2:45 p.m.

On a motion for new trial, the excessively long hours were complained of and it was alleged that as a result: (a) Some of the jurors were asleep and (b) Due to his diabetic condition Mr. Gill was physically

and mentally unable to perform in such round the clock fashion and still do justice to his clients.

Extensive evidence was heard on this motion (R. 255) including the testimony of the jurors, bystanders who saw two of them either sleeping or apparently asleep during trial and Mr. Gill's personal physican, Dr. Morrison who gave a detailed history of Mr. Gill's medical history during recent years, showing conclusively that, due to his diabetic condition and other ailments, it was physically impossible for him to perform as a trial counsel until 3 a.m. with any degree of mental alertness whatever. He also described the resultant effects of this ordeal upon his patient after the trial, and how he was hospitalized and treated for weeks thereafter.

Mr. Gill also took the stand, testified to his physical condition when he first moved for a mistrial, and testified also to the fact that, the following day, during his own argument to the jury, he noticed one of the jurors nodding and apparently asleep. (R. 322 and 323.) He admitted that he probably should have moved for a mistrial then or called the Court's attention to the sleeping juror but he was in such poor physical condition that his judgment was not good and he did nothing. (R. 323.)

During the hearing of this motion the trial Judge argued with Mr. Gill as to whether or not any juror had been roused from sleep by a court attache, the Judge insisting that no such thing happened. (R. 323,

324.) However, after several witnesses testified that at least two of the negro jurors were either asleep or apparently sleeping, THE TRIAL JUDGE'S OWN CRIER, MR. MARCHESE, TESTIFIED THAT HE HAD DEFINITELY NOTED ONE NEGRO JUROR HAD HIS EYES CLOSED. (R. 349, 350.)

Mr. Gill's personal physician, Dr. Morrison, gave a detailed medical history of his patient and made perfectly clear that the ordeal of being made to try a case all day, straight through until 3 a.m. and then being made to return at 9:30 a.m. the same morning to continue trying a case made it impossible for Mr. Gill to maintain any degree of efficiency whatever in his condition. Dr. Morrison stated that, after working beyond a twelve hour period his efficiency would be "almost nil". (Vol. 2, R. 338.) Dr. Morrison was intimately acquainted with Mr. Gill's physical history, having treated him for many years. He stated that his patient had been suffering from diabetes since 1951 or 1952. (Vol. 2, R. 339.) At the time of trial he had been suffering from an acidotic condition due to diabetes together with nervous exhaustion which had commenced about March 15, 1966 (six days before trial) and that when he examined Mr. Gill shortly after trial on March 26 he was complaining of feeling very fatigued and having pain over the region of the heart. He seemed to have a bloated appearance and had a blood sugar content which was abnormally high —about 240 as against a normal range of between 80 to 130. (Vol. 2, R. 338, 9.) Due to a shortage of beds in the hospital he couldn't hospitalize him imme-

diately, despite efforts to do so at both Baptist Hospital and Touro. He treated Mr. Gill until March 31, when he finally got him into a hospital and he stayed in the hospital until April 12, stating: "It took that amount of time to get his diabetes under control", and he continued home treatment for the diabetes and other ailments discovered during the hospitalization period. (R. 339, 340.)

REASONS FOR GRANTING THE WRIT.

Here we have an indigent negro, Charbonnet, jointly charged in a single, two count information, with sale and possession of marijuana, who was not represented at all by counsel, either at his initial arraignment or through the trial of many crucial motions vitally affecting his defense. Moreover, he was not even present during the trial of these important motions. The excuse given, noted above by the language of the trial Court is that he was not required to be present simply because he had not filed the motions.

Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965) settled the issue that the right to counsel and right to be present at trial, guaranteed by the Sixth Amendment to the Constitution of the United States are binding upon State criminal prosecutions and the denial of such rights is a denial of due process under the Fourteenth Amendment.

The motions mentioned above, particularly the motion for a preliminary hearing and the hearing which

was held pursuant to such motion, encompassed issues vital to Charbonnet. These defendants were jointly charged in a single information involving a single transaction, i.e., the sale and possession of $20 worth of marijuana. As noted above, the trial Judge himself admitted, in disposing of the preliminary hearing, that he found joint action by the three accused, (Vol. 1, R. 64). In fact, in the confusion which prevailed, he found an outright conspiracy, though no conspiracy was formally charged.

The issue involved in the preliminary hearing was whether or not *any or all three* of the jointly charged defendants, could be held for trial. The Court held that there was such sufficiency as to all three. This, clearly, was a finding which vitally affected Charbonnet. *Yet he was neither present nor represented nor even notified of this hearing or the others described above.*

Moreover, it is untenable to suppose that failure of his later employed counsel to move anew for another preliminary hearing or to renew the other motions, amounted to a waiver of any kind. UNDER LOUISIANA LAW THE GRANTING OF A PRELIMINARY HEARING IS DISCRETIONARY AND THERE IS LITTLE LIKELIHOOD THAT THE TRIAL JUDGE, HAVING HEARD THIS EXTENSIVELY TRIED MOTION, WOULD HAVE GRANTED A RE-TRIAL OF THE SAME MOTION. (See Appendix B, pertinent La. Criminal Code Articles.)

In addition to the lack of counsel, of course, the weird procedure here was a violation of the basic rights to confront ones accusers, guaranted even under the State Constitution. We submit that the rationale of the Supreme Court of Louisiana on this point, Appendix A, pages 55 et seq., is wholly incomprehensible. The statement by the Supreme Court of Louisiana: (at page 56 of the opinion, Appendix A)

"*** he was never without counsel."—is true only in the sense that Charbonnet had a succession of appointed counsel but neither he nor they were ever notified of the various motions or hearings and Charbonnet was neither present or represented until long after his arraignment and long after the many motions vitally affecting him had been disposed of. Such piece meal procedure in which an indigent negro is left in jail, unnotified and unrepresented to all practical purposes, while the other jointly charged defendants fight out vital issues in Court, is simply barbarous in this supposedly enlightened age. What the Supreme Court of Louisiana sanctioned here was not even good procedure before the Civil War. It harks back to the Star Chamber.

Moreover, by reason of the absence of Charbonnet from these hearings, particularly the preliminary hearing and motion to quash, the other defendants, Skinner and Gueldner, were deprived of whatever benefit they might have derived by reason of his being able to hear the details of what was charged. Having him present physically in Court would have been of

substantial assistance to these last named accused because Charbonnet alone was present during the heroin transaction (engrafted onto the marijuana charge) and he alone was in a position to furnish information whereby the State witness could have been challenged on this phase.

THE CONSPIRACY CHARGE.

In its original opinion the State Supreme Court reversed the conviction solely on the basis of the giving of the charge on conspiracy when no conspiracy was charged.

Let us examine the practical prejudicial effect here of the charge on conspiracy. As noted above, the information here simply charged the three defendants, in two counts, with selling marijuana and with possessing marijuana, both on the same date, May 21, 1965. (R. 22, 23, information) As noted in later bills of exception, the State, under the justification of showing "system" or intent, was permitted to introduce evidence of two other offenses at a later date, May 28, 1965. These last two offenses involved marijuana and heroin. The second sale of marijuana took place allegedly at the same place as the first but the heroin sale allegedly took place at an entirely different location, near a housing development. Moreover, there is not the slightest connection between the heroin sale and either Skinner or Gueldner except the contention that, one week earlier, Skinner had introduced undercover agent Fullington

to Charbonnet. As to the heroin transaction there is not the slightest contention in any of the testimony that either Skinner or Gueldner knew anything about a proposed attempt by either agent to buy heroin. In fact, even taken at face value, the State's evidence shows that even the alleged vendor of the heroin, Charbonnet, did not know that any sale of heroin was in prospect. The agent himself says *that he brought up the subject after completing the second marijuana purchase.* (R. 577, 578.)

Thus, in view of this sharp conflict of the evidence as to the May 21, 1965 transaction (the only offenses charged in both counts of the information) the jury, properly charged, might well have acquitted all three defendants. The later evidence as to the marijuana and heroin sales on May 28 could only have been considered under the theory of system or intent. But, under the sweeping charge given as to the crime of conspiracy, it was impossible for the jury to understand that they could convict only for participation, in some way, with the offenses of possession and sale on May 21, the only offenses actually charged. This seems clear, particularly when the language previously quoted is considered in the light of its practical meaning to laymen. We will not quote the entire charge here but simply emphasize the following instruction by the Court, just after his original sweeping definition of conspiracy. Thus he stated. (R. 358.)

"This *responsibility is not confined to the accomplishment of the common design* for which the con-

spiracy was entered into, *but it extends to, and includes collateral* acts and incidental and *growing out of the common design, etc.*" (Emphasis added.)

How else can this be taken by a juror except as an invitation to convict on the basis of the May 28 transactions regardless of how they felt about the offenses actually charged?

In its opinion on rehearing herein (Appendix A, p. 58 et seq.) the State Supreme Court seeks to justify the reversal of its position on the original hearing wherein the conspiracy charge had been held improper. This discussion, however, ignores completely the prejudicial effect of:

(a) Permitting the giving of a full blown charge of conspiracy complete with the "partnership of crime" instruction wherein the *acts* of all conspirators are chargeable against each other; and

(b) Combining such an instruction with the "system or intent" rule of evidence whereby other offenses, not charged at all, are brought before the jury.

Such a combination, we submit, makes it impossible for a jury to understand that the accused are being tried only for the offense charged, the substantive offense. The element of the conspiracy charge, in which the jury is told that the *acts* of one are chargeable to the other, is an invitation to find any

defendant guilty of any criminal act, whether charged in the information or not. Such a combining of the theory of conspiracy (where no conspiracy is charged) with the "system or intent" rule as to admissibility of other offenses, creates a hodge-podge of confusion which destroys the basic principle of due process that a man can be convicted only of the offense with which he stands charged.

ILLNESS AND EXHAUSTION OF COUNSEL AND THE SLEEPING JURORS.

In disposing of the problems posed by the all-night session and the illness and exhaustion of counsel, the Supreme Court, on rehearing (Appendix A, p. 43 et seq.) notes:

"The record definitely reflects that Mr. Gill was a sick man, but it also reflects that when he questioned defendants' witnesses he was astute, thorough and vigorous."

Just how the Supreme Court, reading a cold record, could reach any conclusions as to how "thorough" counsel was when obliged to do battle through the middle of the night, is of course a mystery. Most Courts content themselves with endeavoring to ascertain what *is* in the record. The Louisiana Supreme Court, however, in reaching the above conclusion has, concluded that counsel had done a thorough job and gotten everything into the record that he wanted to. The dangers of such clairvoyant conclusions, how-

ever, is indicated by the fact that, on motion for rehearing it was pointed out that, due to his illness and exhaustion *Mr. Gill had failed to call a key witness for the defense, a party who was to testify as to the true ownership of the automobile in which the marijuana was allegedly found.*

Moreover, as developed in the motion for rehearing, the morning after the all night session, or more properly, six hours after the "recess" at 3 a.m., after a minimum of sleep, counsel were then required to argue their case to a very sleepy jury at 9:30 a.m. There is internal evidence, in the argument of Mr. Gill, that he was indeed, "mortally tired". A veteran of many years criminal law practice, *we find this weary warrior trying to testify ln closing argument,* to which the State properly objected. (Vol. 2, R. 247.)

As to the sleeping jurors, the State Supreme Court blithely brushes this aside by stating that they "were cognizant of the proceedings". (Appendix, p. 45). There was, however, overwhelming evidence that two jurors were asleep and the Court's own crier had the courage to testify to such fact. Under the Courts' approach, all that is required in the jury box is twelve "warm bodies". If this is so, (in Louisiana) we submit it is not due process under Federal concepts.

CONCLUSION.

Many other errors were committed in this travesty of a trial in which the indigent negro, unrepresented except at the actual trial, was sentenced to fifty years in the penitentiary. We submit that any one of the three errors noted above is of sufficient national interest to warrant relief by certiorari here.

For the foregoing reasons petitioners pray that a writ of certiorari be issued to the Supreme Court of Louisiana in the above cause.

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CERTIFICATE OF SERVICE.

I. G. Wray Gill, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing petition for certiorari has been served upon opposing counsel, the Attorney General of Louisiana and the District Attorney for the Parish of Orleans, by mailing same, postage prepaid and properly addressed to their respective offices on March ..., 1968.

March ..., 1968.

G. WRAY GILL

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APPENDIX A—OPINION BELOW

(ON REHEARING)

HAMLIN, Justice:

On original hearing, we set aside the convictions and sentences of the defendants and remanded this case for a new trial. We disposed of only Bill of Exceptions No. 29, finding that it was with merit and that the error complained of therein was prejudicial to the defendants. On application of the State, an unlimited rehearing was granted. Herein, we shall consider all bills of exceptions reserved during the course of trial and not abandoned in this Court.

Defendants were jointly charged by bill of information containing two counts, with a violation of LSA-R.S. 40:962 on May 21, 1965. The first count charged them with wilfully and unlawfully selling marijuana to Ben Fullington; the second count charged them with the wilful and unlawful possession of marijuana, a narcotic drug. They were tried and all found guilty as charged on both counts and sentenced to serve lengthy terms in the State Penitentiary.[1] They ap-

[1] Skinner was sentenced to serve ten years at hard labor in the State Penitentiary under the first count and five years at hard labor in the State Penitentiary under the second count, the sentences to run concurrently. Under the provisions of LSA-R.S. 15:529.1 (Sentences for second and subsequent offenses) Charbonnet was sentenced to serve fifty years at hard labor in the State Penitentiary under the first count and twenty years under the second count, the sentences to run concurrently. Also under LSA-R.S. 15:529.1, Gueldner was sentenced to serve sixteen years and eight months at hard labor in the State Penitentiary under the first count and five years under the second count, the sentences to run concurrently.

pealed to this Court and the proceedings supra transpired.

BILLS OF EXCEPTIONS Nos. 6, 18, 19 and 21

The above bills are related and will be jointly discussed and determined.

Bill of Exceptions No. 6 was reserved when the trial judge overruled defense counsel's objection to certain parts of the district attorney's opening statement and also denied counsel's motion for a mistrial.

The district attorney's opening statement, which sets forth the alleged pertinent facts of this case, recites in the main:

> "* * * As set out in the bill of information, the defendant, Alton Charbonnet, August Gueldner, and William Skinner, are charged with the violation of Revised Statute 40:962, relative to the sale and possession of marijuana. Said offense occurred on May 21, 1965. * * * The facts will show that on May 21, 1965, Special Agent Benjamin Fullington of the Louisiana State Police Department, in his role as undercover agent, went to Skinner's Motor Mart at 2101 Canal in the City of New Orleans and met with the defendants, August Gueldner and William Skinner for a tentative narcotics buy. At the time Skinner stated to the agent he knew someone who could get the stuff. In Agent Fullington's presence, the defendant Skinner, made a phone call and after completing

the call, told the agent he would have a matchbox of marijuana delivered that night at 2101 Canal. At about 8:00 P.M. that evening Agent Fullington returned to the auto lot and asked Skinner and Gueldner if the stuff had been delivered. Skinner confirmed the delivery and stated the man who sold it wanted to meet him. Skinner then introduced Agent Fullington to Alton Charbonnet. Charbonnet told Agent Fullington that the stuff was stashed under the seat of a 1960 white Lincoln convertible which was parked in this lot. Upon reaching the 1960 Lincoln convertible which belonged to Skinner, Fullington reached under the seat on the driver's side and removed a matchbox which contained a brownish green vegetable matter later identified as marijuana. * * * During the course of the trial the State will introduce evidence of a subsequent sales transaction involving the three defendants to Detective Russell Hebert, an undercover agent, in order to show system, intent, and guilty knowledge, which occurred on May 28, 1965. * * * these defendants were arrested at a later date when the undercover operation was concluded. At the time of the arrest of the defendant, William Skinner, he made certain oral statements, admissions, and/or confessions, which the State will attempt to introduce after laying the proper legal foundation. * * * The State will offer and introduce and file into evidence the following physical evidence which was sold to Agent Benjamin Fullington on May 21, 1965: One matchbox containing greenish brown vegetable matter,

chemically analyzed as marijuana; one large evidence envelope and one small evidence envelope. The State will further offer, introduce and file into evidence the following physical evidence which was sold to Detective Russell Hebert on May 28, 1965: Nine handrolled cigarettes, chemically and microscopically classified as marijuana; one small evidence envelope, one large evidence envelope, and four capsules of white powder identified as heroin, an opium derivative, along with a small manila envelope and a large manila evidence envelope. * * *"

Bills of Exceptions Nos. 18, 19 and 21 were reserved when the trial judge overruled defense counsel's objections to the testimony of the State's witnesses with respect to the alleged sales of May 28, 1965 and the negotiations therefor (supra, opening statement), overruled counsel's objections to the introduction in evidence of the narcotics allegedly sold on May 28, 1965 (supra, opening statement), and denied defendants' motion for a mistrial.

Counsel for the defendants contended that the State should have elected to try the alleged case of May 28, 1965. They argued that there could be no system for the sale of narcotics—not being similar to embezzlement or an offense that presupposes a system. They argued that the mentioning of the events of May 28, 1965 prejudiced the rights of the defendants. Herein, they argue that unless this Court wishes to equate LSA-R.S. 15:456 with an informal "conspiracy" stat-

ute, something should be done to clarify the law quo ad the two aspects presented: "intent" and "continuity" of the offense or "system evidence."

One of the steps in trial is the opening statement of the district attorney explaining the nature of the charge and the evidence by which he expects to establish the same. LSA-R.S. 15:333 (See, new Code of Criminal Procedure, Arts. 765 and 766). "The underlying spirit and purpose of Article 333 of the Code of Criminal Procedure mandatorily requiring an opening statement by the district attorney is to force him to disclose the state's evidence, not only to inform the court, the jury and the defendant of what facts the state intends to prove, but in fairness to permit the defendant to adequately present his defense and avoid being taken by surprise." State v. Jones, 230 La. 356, 88 So.2d 655. In the exercise of a wise discretion, the trial judge controls the scope and extent of an opening statement, and a conviction will not be set aside for error therein unless the rights of an accused are plainly violated. State v. Clark, 231 La. 807, 93 So.2d 13. The opening statement forms no part of the evidence, has no binding force, and is designed only to give a general acquaintance with the case which will enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses. State v. Clark, supra.

In the district attorney's opening statement, we find nothing prejudicial to the substantive rights of the accused. LSA-R.S. 15:557 (See, new Code of Crim-

inal Procedure, Art. 921). The district attorney merely stated what he intended to prove during the case. He apprised the defendants of evidence he intended to introduce; this enabled their counsel to adequately prepare their defense, thus avoiding the element of surprise.

LSA-R S. 15:445 provides:

> "In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

LSA-R.S. 15:446 provides:

> "When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged."

In State v. Johnson, 228 La. 317, 82 So.2d 24, 29, we commented on rehearing that the general rule is that evidence of the commission of an offense other than the one with which a defendant is charged is not admissible. We said, however, that there are recognized

exceptions as provided by Articles 445 and 446 of the Code of Criminal Law and Procedure, such as where the evidence is introduced for the purpose of rebutting the inference that the crime charged was not committed by accident or mistake but with a guilty knowledge or evil motive, and where the evidence shows a system of wrongdoing. We further stated that it is well recognized that the exceptions to the general rule apply not only to prior criminal offenses committed by the defendant, but also to offenses committed *subsequent* to the offense charged. See, State v. Maney, 242 La. 223, 135 So.2d 473; Cf. State v. Oliver, 247 La. 729, 174 So.2d 509; State v. Butler, 249 La. 861, 192 So.2d 103; State v. Reese, 250 La. 151, 194 So.2d 729; State v. Richard, 245 La. 465, 158 So.2d 828.

Herein, a reading of the testimony attached to Bills of Exceptions Nos. 18, 19 and 21, a discussion of which we find unnecessary, discloses that the State introduced in evidence all testimony and physical evidence pertinent tc the instant bills which it had referred to in the district attorney's opening statement. Proof was submitted of all allegations. The testimony adduced and the physical evidence introduced with respect to the transactions of May 28, 1965 (these transactions allegedly took place among *some* of the defendants, not all of them) were a part of the State's proof of the guilty knowledge, intent, and system of selling and possessing narcotics of all defendants. Under such circumstances, we find that the evidence was admissible under an exception to the general rule that evidence of the commission of an offense other

than the one with which the defendants are charged is not admissible.

Bills of Exceptions Nos. 6, 18, 19 and 21 are without merit.

BILL OF EXCEPTIONS No. 8

Bill of Exceptions No. 8 was reserved when the trial judge sustained the State's objection to a question propounded by defense counsel to Officer Benjamin Fullington, a State witness.

Benjamin Fullington, an undercover detective with the Louisiana State Police, Detective Bureau, Narcotics, was also employed by Gulfco Finance Company at the time he was making the investigation which led to the defendants' arrest. He testified that on May 15, 1965, his superior at the finance company knew of his undercover work. He took applications for loans from Gulfco Finance Company on Skinner's Motor Mart lot, taking the applications for the defendant Skinner. He said he had seen Skinner on approximately twelve occasions prior to May 21, 1965. After testifying that he had "displaced" Ben Keenan as Manager of Gulfco, Fullington was asked:

> "Did you at or about that time, while you were there and Mr. Keenan was there, have a discussion about the loans after Mr. Keenan gave you his opinion about some of the loans you were making?"

The State objected to the above question, and, as stated supra, the objection was sustained. The witness did not answer.

We find that the evidence sought to be elicited was neither relevant nor material. We affirm the trial judge's per curiam to this bill. It recites:

> "While the State witness, Officer Benjamin Fullington, was under cross-examination, the attorney for defendants asked several questions about loans he, the witness, was making.
>
> "The State objected, stating as the reason for its objection that the question and answer would be irrelevant and immaterial.
>
> "The defendants were on trial for selling and possessing narcotics and what loans of money the witness was making was certainly irrelevant and immaterial to the issues being tried.
>
> "Attorneys for the defendants did not state at any time that their purpose was to test the credibility of the witness.
>
> "Counsel for defendants, after the objection of the State, merely stated: 'I think it's material to show his approval of the loans that were no good.' "

Bill of Exceptions No. 8 is without merit.

BILLS OF EXCEPTIONS Nos. 11, 14 and 15

The above bills are related and will be jointly discussed.

Bill of Exceptions No. 11 was reserved when the trial judge denied defense counsels motion for a mistrial and sustained the State's objection to questioning Ben Fullington on cross-examination with respect to a booking of defendant Gueldner on July 30, 1965 with delivery of central nervous system drugs.

Bill of Exceptions No. 14 was reserved when the trial court sustained the State's objection to the following question propounded to Sgt. Russell Hebert on cross examination:

> "Tell His Honor and the gentlemen of the jury what Mr. Gueldner was booked with when he went to the First Precinct."

Bill of Exceptions No. 15 was reserved when the trial judge ruled the police arrest book inadmissible in evidence and sustained the State's objection to the following question:

> "Does it show any complaint of a direct sale . . . Does that booking show a complaint of a sale on any date by Mr. Gueldner?"

Counsel for the defendants contend that the rulings of the trial judge were erroneous. They urge that they were unduly restrictive because counsel were

trying to show that defendant Gueldner was first booked for an offense of which he was innocent, this charge being dropped and the instant one substituted. It is further argued that Gueldner had a legal prescription for possession of central nervous system drugs.

Defendants were charged by bill of information with the possession and selling of marijuana; they were tried on the information; they were not tried for the possession or delivery of central nervous system pills. The evidence sought to be adduced was irrelevant and immaterial. The trial judge correctly stated in his Per Curiam to Bill of Exceptions No. 14 that, "What a police officer books a prisoner with at a precinct station has nothing to do with what charges the District Attorney files against the same person in Criminal District Court." Cf. State v. Young, 249 La. 1054, 193 So.2d 243.

Bills of Exceptions Nos. 11, 14 and 15 are without merit.

BILL OF EXCEPTIONS No. 12

Bill of Exceptions No. 12 was reserved when the trial court denied defense counsel's request for a mistrial and overruled their objections to certain testimony given by Sgt. Russell Hebert.

In his following per curiam to the instant bill, the trial judge states all of the circumstances connected

with its reservation. His ruling is correct; we agree with his reasoning.

"This bill was reserved while the State was laying the predicate for the introduction into evidence of the confession or admission against interest of the defendant, William Skinner, which was done while the jury was outside of the Courtroom.

"The police officers had testified that while they were taking William Skinner to the police station he made a statement to them, which statement was made freely and voluntarily while riding to the station in an automobile.

"William Skinner took the witness stand and testified that the statement was freely and voluntarily made by him. He further testified that he spoke to the officers, rather than the officers speaking to him.

"The Court held the statement of William Skinner to be free and voluntary and, therefore, admissible in evidence.

"***

"After the jury was returned to the Courtroom the same procedure was followed and the Court, in the presence of the jury, admitted into evidence the statement of William Skinner. Mr. Gill made his objection and reserved his bill of exception.

"It later turned out that the statement of William Skinner made to the police was not a confession or admission but, in fact, was a denial of his guilt and a threat against the police officers who took part in the investigation.

"At this time the defense moved for a mistrial on the ground that the assistant district attorney, in his opening statement, stated that he would prove that the defendant, William Skinner, had made certain oral statements, admissions, and/or confessions and that the statement by the defendant, William Skinner, was not in conformity with the statement made by the Assistant District Attorney in his opening statement.

"The Court overruled the motion for a mistrial.

"Thereupon the defense reserved a fill of exceptions to the Court's ruling.

"Later during the trial, the Court in its charge to the jury charged the jury on this point as follows:

"The law requires and obligates the District Attorney, representing the State of Louisiana, to make an opening statement explaining the nature of the charge and the evidence by which he expects to prove same. The law leaves to the counsel for the defendant the option of explaining his defense and the evidence by which he expects to establish the same, or of waiving his right to make an opening statement.

"The function and purpose of an opening statement by the District Attorney is simply to explain the nature of the charge and the evidence by which he expects to establish the same; the opening statement by counsel for the defendant is to explain the theory of the defense and the evidence by which he expects to prove same. An opening statement made by the District Attorney or the counsel for the defendant is not part of the evidence and does not prove anything at all in the case. You are to consider only the evidence in the case and the testimony of sworn witnesses who have appeared before you on the witness stand.

"Should either the District Attorney or the counsel for the defendant make statements in an opening statement and fail to substantiate them by the testimony of sworn witnesses on the witness stand, you are to place no value whatsoever upon the statement made by them, but on the contrary, you should disregard the same as if never having been uttered."

The fact that the State did not introduce oral admissions and/or confessions of defendant William Skinner, which the district attorney in his opening statement said it would do, did not prejudice the substantial rights of the defendants. "Albeit, we know of no rule of law which requires that the State offer all evidence referred to by the prosecutor in his opening statement or any jurisprudence holding that the ac-

cused necessarily suffers prejudice if he does not. Quite the contrary, it would be more logical and reasonable to conclude that the failure or inability of the State to elicit any evidence outlined in the opening statement redounds to the advantage and benefit of the accused." State v. Johnson, 226 La. 30, 74 So.2d 402. See, State v. Augustine, 241 La. 761, 131 So.2d 56.

Bill of Exceptions No. 12 is without merit.

BILL OF EXCEPTIONS No. 23

Bill of Exceptions No. 23 was reserved when the trial court denied defense counsel's motion for a mistrial, said motion being based on the trial judge's refusal to grant a continuance.

The circumstances connected with the reserving of this bill are to the effect that shortly before midnight, 11:40 P.M., March 21, 1966, the State rested its case. The following colloquy ensued:

"BY MR. GILL:

Before asking for a recess, I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.

"BY THE COURT:

You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight. Go to work and see if we can't finish the case tonight.

"BY MR. GILL:

I'll do what Your Honor says.

"BY THE COURT:

I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . . .

"BY MR. GILL:

I want to say one thing, Your Honor. I have a severe case of diabetes.

"BY THE COURT:

I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

"BY MR. GILL:

May I further say this. I tested myself for sugar . . .

"BY THE COURT:
We will take a recess for three minutes.

"BY MR. GILL:
If Your Honor please, I respectfully request Your Honor declare a mistrial.

"BY THE COURT:
Request for mistrial is denied."

On motion for a new trial, it was alleged by counsel for Alton J. Charbonnet that defendant believes and is informed that one or more jurors were asleep during the presentation of evidence between the hours of 1:00 A.M. and 3:00 A.M., March 22, 1966, and that a new trial should be granted because the jurors were unable to give proper appreciation to the facts.

Counsel for the defendants, Skinner and Gueldner, alleged in motion for a new trial that, "* * * the Court specially erred in refusing to grant a continuance and a motion for a mistrial after the State had concluded the presentation of evidence, which was approximately 11:30 P.M. and that as observed by the Court, counsel for defendants had been asking that the matter be deferred to the following day because of counsel's physical condition, the magnitude and import of the trial and counsel's inability to properly proceed further because of his physical condition." Counsel further alleged that during the course of the introduction of testimony by the defendants at both the late hours of the night and early hours of the following

morning, some of the jurors were sleeping. Counsel still further alleged that during Mr. Gill's argument, one or more of the jurors were sleeping and that this fact was called to the attention of the court.

Since Bill of Exceptions No. 23 and the above portions of the motion for a new trial are related, we shall determine the merit of Bill No. 23 (Bill No. 23 also mentions the alleged sleeping of the jurors) and the merit of the above contention urged in the motion for a new trial hereinafter under our discussion of Bill No. 23.

It is Mr. Gill's position that reversible error was committed when the trial judge did not grant a continuance because of his alleged inability to defend his clients at the time the State rested its case. It is the contention of all defendants that the alleged sleeping of several jurors prejudiced their rights to a fair trial.

After the colloquy, supra, a thirty-five minute recess was taken, and the Court reconvened at 12:25 A.M., March 22, 1966. The jury had been to lunch at 1:05 P.M., March 21, 1966, and returned to their seats at 2:45 P.M. Court had recessed at 6:15 P.M. for dinner, and the jury returned to the courtroom at 8:00 P.M. The jury also had the thirty-five minute recess before the defense began its presentation.

The defense presented its case, resting at 2:45 A.M. March 22, 1966. During the two hours, defense counsel called seventeen witnesses (some of them were char-

acter witnesses), whose recorded testimony consumes approximately eighty-one pages. The record definitely reflects that Mr. Gill was a sick man, but it also reflects that when he questioned defendants' witnesses, he was astute, thorough and vigorous. During the taking of testimony, he reserved bills of exceptions and engaged in colloquy with the court. The record discloses no haziness on the part of Mr. Gill, nor does it reflect any lack of alertness or perception. We conclude that no matter what his physical feelings were, such feelings, as well as his physical condition, had no effect on Mr. Gill's intellectual ability between 12:25 A.M. and 2:45 A.M., March 22, 1966. His personal physician testified on the hearing of the motion for a new trial that Mr. Gill's efficiency would have been almost nil after a twelve hour period. He said that Mr. Gill had an acidotic condition due to diabetes and, of course, nervous exhaustion. We have no doubt that Mr. Gill was tired, but his efficiency contradicted his physician's testimony. It is also to be noted that the physician was not in court while Mr. Gill was presenting his defense. We find that defendants suffered no prejudice insofar as Mr. Gill was concerned.

A review of the pertinent evidence attached to the motion for a new trial constrains us to conclude that during the early hours of March 22, 1966, the jurors were cognizant of the proceedings and appreciated the facts as revealed. Wilson Landry, a juror alleged to have been sleeping, stated that he was the best judge of whether he was sleeping; he said that he was as wide awake as Mr. Gill. He said that no

deputy sheriff touched him (defense counsel contends that he had to be awakened), and that he merely had to be given water when he was coughing. Lloyd Jones, the other juror alleged to have been sleeping, testified that he did not think he was sleeping; he rested his eyes once in a while. Herbert Wilson, a juror who allegedly voted not guilty, testified that he was not asleep and saw no other jurors sleeping. Salvador Marchese, Minute Clerk of Court, testified that Mr. Landry's eyes were closed, but that he could not truthfully answer whether he was asleep. A number of witnesses for the defendants testified that some of the jurors were sleeping. These witnesses, however, were not in close proximity to the jurors. After hearing the evidence on the motion for a new trial, the trial judge concluded that the jurors were not sleeping during trial. After a reading of the evidence adduced, we agree with his conclusion.

After the defense had completed its case, court recessed until 9:30 A.M. All parties were afforded a very short period for sleeping, but the record discloses that the closing arguments were full and were not curtailed, and that the jury deliberated approximately two hours and twenty-five minutes before arriving at a verdict. We conclude that the defendants suffered no prejudice.

It is legion that the granting or refusal of a continuance rests in the sound discretion of the trial judge, and his ruling will not be disturbed except where his discretion has been arbitrarily or unrea-

sonably abused. LSA-R.S. 15:320 (now Art. 712 of the new Code of Criminal Procedure); State v. Thomas, 214 La. 499, 38 So.2d 149; State v. Jones, 249 La. 324, 186 So.2d 608; State v. Ganey, 246 La. 986, 169 So.2d 73.

Despite the facts that counsel suffered fatigue during the trial of this case and that the jury was forced to sit long hours, having little sleep, we conclude that the trial judge did not arbitrarily and unreasonably abuse his discretion in not granting a continuance. No substantial rights of the defendants were violated, nor were they prejudiced.[2]

Bill of Exceptions No. 23 is without merit.

BILL OF EXCEPTIONS No. 24

Bill of Exceptions No. 24 was reserved when the trial court refused to allow defense counsel to introduce in evidence a $25.00 receipt for a down payment on a 1959 Chevrolet Impala, allegedly dated May 20, 1965 and signed by defendant Gueldner, and a bill of sale for the car, allegedly dated May 21, 1965 and signed by defendant Gueldner. Both documents had been given to Virgie Niette.

[2] We agree with the following statement of the State in its brief: "The State concedes that it was hard on the lawyers involved to get only a few hours sleep on the night of March 21-22, 1966, during the trial of this case, but *how were the accused prejudiced*? Under Article 557 of the 1928 Code of Criminal Procedure, Article 921 of the present code, and the well settled jurisprudence, persons who appeal to this Court are granted a new trial only if a ruling of the trial judge has probably resulted in a miscarriage of justice, is prejudicial to the rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

The facts leading to the reservation of this bill are to the effect that Virgie Niette testified that on May 19, 1965, she went to Skinner's lot on Canal Street for the purpose of assisting her daughter, a minor, in locating an automobile for purchase. On the same day, she also went to Skinner's Gentilly lot to look at a car on which her daughter had her heart set. Mrs. Niette returned to the lot on May 20, 1965 and made a $25.00 down payment on a Chevrolet; the receipt for payment was signed by Gueldner, known to Mrs. Niette as "Richie," and by Mrs. Niette's daughter. Mrs. Niette went to the lot on May 21, 1965 for delivery of the car. She said that she arrived at the lot at 9:00 A.M. and remained there until 2:30 P.M. She testified that she received a bill of sale dated May 21, 1965; it was signed by Gueldner. Mrs. Niette's testimony with respect to the presence of undercover agent Fullington, Skinner and Gueldner on Skinner's lot is as follows:

"Q. While you were there, did you see this young man [Fullington]?

"A. No, I did not.

"Q. When you got there, with reference to Mr. Skinner and Mr. Gueldner, on May 21st, I'm speaking of—you say you got there at 9:00—when you arrived at the lot, which one of these gentlemen did you see there?

"A. Richie.

"Q. Mr. Gueldner you are referring to?

"A. Yes, sir.

"Q. Did there come a time—was Mr. Skinner there when you got there?

"A. No, he was not.

"Q. Was he there that morning?

"A. No.

"* * * *

"Q. Did there come a time when you later saw Mr. Skinner at the lot and, if so, about what time?

"A. About 1:00 in the afternoon.

"Q. Where was Mr. Gueldner all that time?

"A. He was with me.

"Q. What do you mean 'with me'?

"A. Because I was aggravating him about my automobile.

"* * * *

"Q. Where was Mr. Gueldner from 9:00 to 12:00?

"A. Sitting in the office.

"Q. With you?

"A. Right. [On cross-examination Mrs. Niette testified that Richie did not leave her presence; she stayed by his side, not giving him a chance to leave. He was with her from 9:00 A.M. until 2:30 P.M.; she was mad and aggravated.]

"Q. Mr. Fullington stand up. Did you see this gentleman there?

"A. No, I did not.

"Q. Did you see him come there and talk to Mr. Gueldner or anyone else there that morning?

"A. No, sir."

After adducing the above testimony, counsel for defendants offered in evidence the $25.00 receipt and the bill of sale, supra. The trial court refused to admit the documents in evidence, holding that they were irrelevant and immaterial.

In Bill of Exceptions No. 24, counsel for the defendants argue: "* * * * this was legal evidence of and on behalf of the defendants to show and cooperate [sic] Mrs. Niette to the effect that she did see Mr. Richard Gueldner on that day and that she was with him at all times that morning, hence he could not have been arranging for a narcotic sale and/or delivery, and that Mr. Skinner was absent and hence could not be present as related by witnesses tending to show that he had arranged for a sale of marijuana that day. That same should have been shown to the jury, which would have been proof positive in cooperation [sic] of her testimony as to events that happened on the day that the law was alleged to have been violated and which happened at a time unsuspicious and in a unsuspicious manner. And the refusal by the Court to permit the offer in evidence was tantamount to saying to a jury that the court did not believe the lady's testimony or that the receipt was a valid and truthful one."

Undercover agent Benjamin Fullington testified that he went to Skinner's lot on the morning of May 21, 1965 and told Skinner he was looking for a contact to buy marijuana. He said that Skinner made a telephone call, at which time he and Gueldner were

also present. Fullington placed himself on the lot at 11:00 A.M., May 21, 1965; his testimony is contradicted by that of Mrs. Niette, supra.

Mrs. Niette's testimony with respect to her presence on the Skinner lot, as well as her testimony with respect to her purchasing an automobile, is not contradicted. Had the documents been admitted in evidence, they would have only served as cumulative and corroborative proof of uncontradicted facts. Under such circumstances, the documents were not relevant and material. Cf. State v. Jackson, 248 La. 919, 183 So.2d 305.

Fullington's testimony, which, as stated supra, was contradicted in part by Mrs. Niette, and Mrs. Niette's testimony with respect to the parties she saw on the lot, as well as her testimony with respect to when and for how long she saw Skinner and Gueldner, went to the jury for its consideration and determination of its credibility.

We do not find that the defendants suffered any prejudice by the trial judge's ruling that the instant documents were inadmissible in evidence; nor do we find that he abused his discretion.

Bill of Exceptions No. 24 is without merit.

BILL OF EXCEPTIONS No. 27

Bill of Exceptions No. 27 was reserved when the trial judge denied defense counsel's motion for a mistrial based on the following statement contained in the State's closing argument:

> "* * * * We seek the truth. Mr. Gill and Mr. Link have twisted phrases which, in some respects, is their prerogative in an argument because what I say and what Mr. Link and Mr. Gill have to say is purely our appreciation of the particular case that is presented to you. As jurors, though this trial has been long, you have paid attention to your witnesses. There were witnesses that were placed on the stand and there were witnesses who were not placed on the stand . . ."

Counsel for the defendants contend that the above remark was damaging to the defendants, and that the obvious impact of the statement was calling attention to the fact that the defendants Gueldner and Charbonnet had not testified. (Skinner took the stand for a limited purpose.) They argue that the State's remark could have served no other purpose, since Gueldner and Charbonnet called no witnesses on their own behalf.

In his per curiam the trial judge stated:

> "Counsel had in no manner, shape or form referred to the defendants in his statement but had referred to the witnesses.

"There were a number of witnesses both for the State and the defense subpoenaed of which eighteen (18), including the defendant, William Skinner, took the witness stand and testified, and four (4) that were not placed upon the witness stand.

"The witnesses that did not take the witness stand are the following named persons: Jack Weis, Richard Weis, David Steece and Gerald Andry.

"The Court is and was of the opinion that the Assistant District Attorney was not referring to the defendants in his remark but was simply referring to the witnesses.

"The Court is of the further opinion that the remarks of the counsel for the State complained of by the defense did not influence the jury and that the remarks did not contribute to the verdict found.

"State v. Shoemake, 78 So. 240."[3]

[3] In State v. Shoemake, 143 La. 65, 78 So. 240, the district attorney made the following remark in his argument to the jury: " 'You are called upon, gentlemen, to say whether or not under the proof in this case there is anything to Christian experience and Christianity and whether Christianity in this parish is dead.' " In holding that the remark was not objectionable, this Court stated: "The remark of the district attorney with reference to Christianity was not calculated to have any influence on the minds of the jurors, and it certainly did not contribute to the verdict found. The judge states in his per curiam to a bill of exceptions that defendant was charged with the murder of a female child some 16 years of age, yet the verdict found him guilty without capital punishment. The remark of the district attorney appears, if it had any effect, to have been favorable to the accused."

With respect to the trial judge's per curiam, counsel for the defendants argue: "This conclusion, of course, is based upon the false assumption *that the jury knew there were other witnesses who had been subpoenaed but not called.* It may well be that the Court, having access to the subpoenas, could determine what witnesses had been called. But the jury had no means of knowing this. Merely because a large group of witnesses were called in at the start of the trial (if, indeed, they ever were) this would not give the jury a sufficiently accurate run-down of the witness situation to indicate that there were any other witnesses left, except the defendants who had not testified."

Art. I, Sec. 11, La Const. of 1921, provides that no person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution. In Griffin v. State of California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229, the United States Supreme Court stated that the Fourteenth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. It held that the self-incrimination clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment. This Court has consistently held that a district attorney commits reversible error when he comments upon the failure of a defendant to take the witness stand. In the instant case, however, we do not think that the comment of the State had reference to the defendants Gueldner

and Charbonnet. We agree with the trial judge as to the import of the remark—it referred to witnesses and not to the defendants Gueldner and Charbonnet. Defendants suffered no prejudice, and reversible error was not committed. See, State v. Bentley, 219 La. 893, 54 So.2d 137; State v. Simpson, 247 La. 883, 175 So.2d 255; State v. Bickham, 239 La. 1094, 121 So. 2d 207.

Bill of Exceptions No. 27 is without merit.

BILL OF EXCEPTIONS No. 35

This bill will be further discussed at the end of our opinion under "Motions for a New Trial."

Bill of Exceptions No. 35 was reserved when the trial court overruled defendant Charbonnet's motion for a new trial.

In his motion for a new trial, Charbonnet contends in part that his constitutional rights, Art. I, Sec. 9, La. Const. of 1921, were violated because he was not present either in person or represented by counsel at the hearing of the motion to suppress during October, 1965.

We agree with the State that the instant bill is totally lacking in substance. The minutes of the trial court and the endorsements on the Bill of Information reflect that the present information was filed on August 11, 1965. Charbonnet and the other two defendants were arraigned on August 26, 1965; each

pleaded "Not Guilty." Gueldner and Skinner were allowed ten days in which to file pleadings, and the court ordered Charbonnet to return on September 2, 1965 to determine counsel. On September 2, 1965, Charbonnet was granted time until September 10, 1965 to obtain counsel. He evidently did not secure counsel, and, on September 20, 1965, the trial court appointed Joseph Monie, Esq., to represent the defendant Charbonnet; thereafter, he was never without counsel. On October 8, 1965, the appointment of Monie was rescinded, and Bentley Byrnes, Esq., was appointed as counsel for Charbonnet. The appointment of Byrnes was rescinded on January 11, 1966, and Maurice Burk, Esq., was appointed counsel for Charbonnet. On this same day, Robert Link, Esq., filed a Motion for Reduction of Bail as to Alton Charbonnet. On January 18, 1966, the trial court rescinded the appointment of Burk and appointed Link to represent Charbonnet in any further proceedings; Link fulfilled and is fulfilling the assignment.

During the fall of 1965, court appointed counsel for Charbonnet filed no preliminary pleadings. It was during this time that counsel for Skinner and Gueldner filed the Motion to Suppress and Dismiss. The motion makes no mention of Charbonnet; it alleges, "Now comes your defendants, William R. Skinner and August R. Gueldner." Counsel for Charbonnet and Charbonnet himself did not appear at the trial of the motion, but, on January 31, 1966, the trial court granted Mr. Link's Motion to Obtain Transcripts of

Preliminary Hearing and other proceedings previously held for co-defendants. Mr. Link took no further action; trial ensued on March 21-22, 1966. Mr. Link joined with Mr. Gill, counsel for Skinner and Gueldner, during the course of trial. It was only after trial that he made the present complaint with respect to defendant Charbonnet's alleged rights.

It is true that the minutes of court must show that the accused was present at every important stage of the trial for a felony from the moment of his arraignment to his sentence, State v. Pepper, 189 La. 795, 180 So. 640; State v. Breedlove, 199 La. 965, 7 So. 2d. 221, but, as stated supra, defendant Charbonnet pleaded "Not Guilty," and was thereafter represented by counsel. His counsel did not file a Motion to Suppress. Under such circumstances, we conclude that it was not imperative that he be present at the trial of the Motion to Suppress and Dismiss filed by defendants Skinner and Gueldner. Charbonnet suffered neither prejudice nor violation of his constitutional rights.

Bill of Exceptions No. 35 is without merit.

BILL OF EXCEPTIONS No. 29

Bill of Exceptions No. 29 was reserved when the trial judge overruled defendants' objection to the trial judge's charge on "Conspiracy." The objection was made by Mr. Gill, who stated:

> "I respectfully object to Your Honor's charge on conspiracy, both as to its tenor and applica-

bility in this case. I object to Your Honor's charge on confessions and inculpatory statements and on circumstantial evidence as regards conspiracy and also with reference to system."

In our original opinion, we recited in its entirety the trial judge's charge with respect to "Conspiracy." We find no need for reiteration herein. We correctly said that it contains a full statement relative to the law of conspiracy.

Counsel for the defendants objected to the conspiracy charge both as to its tenor and applicability in this case. In our original opinion, as stated supra, we found that the objection had merit. After reconsideration, we now find that the trial judge did not abuse his discretion in giving the conspiracy charge, and that defendants' objections do not show that he committed reversible error.

We originally relied on the cases of State v. Gunter, 208 La. 694, 23 So.2d 305, and State v. Fletcher, 236 La. 40, 106 So.2d 709. These cases only hold that the trial judges therein committed no error in refusing to give conspiracy instructions to the jury. We do not find that the cases provide authority for the present decision.

In the Fletcher case we did say that: "The request to include a statement concerning the law of conspiracy in the general charge was likewise properly denied as being irrelevant. Appellant was charged

with the substantive offense of possessing narcotics and not with the separate and distinct crime of a conspiracy to possess them, which is composed of different elements." It must be noted that only one defendant, George Fletcher, was charged. The trial judge, as found by this Court, did not commit reversible error in refusing to give the conspiracy charge.

The Gunter case involved three defendants, Jeff Gunter, Wilson Hargraves and Henry Murray. They were charged by bill of information with the offense of simple kidnapping. Murray pleaded guilty and was used as a state witness; Hargraves and Gunter were jointly tried. In the body of this Court's opinion, we find the following statement:

> "The defendants in this case were jointly charged with the offense of simple kidnapping under Article 45 of the Criminal Code. They were charged as principals and not as conspirators. Murray was an accomplice in the crime, and his testimony consisted merely of a recital of the various acts done by each defendant in the perpetration of the crime."

This Court affirmed the conviction of Gunter but set aside that of Hargraves, finding that the trial judge had abused his discretion under the facts disclosed in not appointing a lunacy commission to determine the issue of present insanity. We thus find that this Court affirmed the conviction of only one defendant. There-

fore, even though the trial judge refused to instruct the jury with respect to conspiracy and we approved his action, we cannot say that the case lends support to the instant defendants' contentions. It is not apposite.

> "Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.
>
> "Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.
>
> "* * *" LSA-R.S. 14:26. Cf. 31A C.J.S., Sec. 362 et seq.

It has been held under the jurisprudence of this Court that where an indictment charges that the crime was committed by two or more persons, such an indictment necessarily involves a conspiracy. Cf. State v. Ford, 37 La.Ann. 443; State v. Dundas, 168 La. 95, 121 So. 586; State v. Gunter, 180 La. 145, 156 So. 203; State v. Gebbia, 121 La. 1083, 47 So. 32; State v. Capaci, 179 La. 462, 154 So. 419; State v. Melerine, 236 La. 929, 109 So.2d 471.

Herein, the State offered evidence seeking to prove a conspiracy among three people jointly charged with

possessing and selling marijuana. It was properly admitted and ruled admissible. State v. Gebbia, supra; State v. Brasseaux, 163 La. 686, 112 So. 650; State v. Robichaux, 165 La. 497, 115 So. 728; State v. Terrell, 175 La. 758, 144 So. 488; 16 Am. Jur. 2d. Conspiracy, Sec. 37, p. 147; Wharton's Criminal Law and Procedure, Vol. IV, Sec. 1779, p. 591. Cf. LSA-R.S. 15:455. It is also to be noted that in his per curiam to Bill of Exceptions No. 19, the trial judge states, "The State had already established that the three defendants on trial had conspired together to sell marijuana to Officer Fullington on May 21, 1965." Cf. State v. Turner, 392 P.2d 863.

The question of whether a conspiracy had been established was a question of fact for the jury. Therefore, the jury had to be instructed on the law of "Conspiracy."

> "While it is error to submit the question of conspiracy if there is no evidence thereof, where there is evidence that the defendants had entered into a conspiracy to commit the crime charged, an instruction on the law of conspiracy is proper, and this, even though the indictment or information may not charge a conspiracy." 53 Am. Jur., Trial, Sec. 673, p. 519.

> "Even though Congress has created a separate crime of conspiracy, it is settled that joint participators in the commission of the substantive offenses may be denominated as conspirators.

Kumpe v. United States, 250 F.2d 125 (C.A. 5, 1957). The conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime. 16 Am. Jur. 2d, Conspiracy, Sec. 38, p. 147[4] (1964).

"It was the function of the Court to define the term 'conspiracy' and to instruct the jury as to the circumstances under which the out-of-court statements were admissible." United States v.

"Declarations and acts of one conspirator pursuant to or in furtherance of the conspiratorial purpose are admissible in evidence against any other member of the conspiracy if there is at least prima facie proof of the conspiracy alleged by the prosecution. Admissible under this rule and subject to its requirements are books and records used by a coconspirator and, in a prosecution for conspiracy to commit subversive acts, a subversive newspaper published by one of the conspirators. *This rule is applicable in a prosecution for a substantive crime where conspiracy is incidentally involved as well as in a prosecution for the crime of conspiracy itself.* The rule applies whether or not the coconspirator whose declarations are put in evidence is a codefendant of the conspirator on trial. The evidence is admissible against an original conspirator and also against one who joined the conspiracy after its inception.

"* * * *" 16 Am. Jur. 2d, Extrajudicial declaration or act of coconspirators, Sec. 38, p. 147. (Emphasis supplied.)

See, also, 23A C.J.S., Criminal Law, Sec. 1287, Conspiracy, p. 692, to the effect: "Where there is evidence relating to conspiracy in committing the offense, an instruction as to such law is proper, but where the evidence does not show a conspiracy, an instruction as to such law is erroneous, and need not be given, nor need an instruction as to abandonment of the conspiracy be given where there is no evidence of such withdrawal. Where no conspiracy is shown, the court should instruct that accused could not be convicted unless he personally committed the crime charged. On the other hand, where the state's theory is that a conspiracy existed, an instruction that mere presence at the commission of the crime, although such presence is for the purpose of aiding in the commission thereof, is insufficient to constitute guilt, if no actual aid or encouragement is rendered the principal, is properly, refused as ignoring the issue of conspiracy."

Hoffa, 349 F.2d 20, 41, affirmed, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374. See, 66 A.L.R. 1311; State v. Capaci, 179 La. 462, 154 So. 419.

Herein, it was the duty of the trial judge to charge the jury on the law applicable to the instant case and to charge the jury that it was their duty to accept and apply the law as laid down for them by the judge. LSA-R.S. 15:385 (new Code of Criminal Procedure, Art. 802). After our present study of this matter and further research of the jurisprudence, we conclude that the conspiracy portion of the charge complained of in Bill of Exceptions No. 29 did not constitute an abstract, inapplicable discourse on the law of "Conspiracy," and was proper.

The rights of the accused were not prejudiced by the charge. In rendering the charge on the law of "Conspiracy," the trial judge neither abused his discretion nor committed reversible error.

Bill of Exceptions No. 29 is without merit.

MOTIONS FOR A NEW TRIAL

As stated supra, counsel for defendant Charbonnet and counsel for defendants Skinner and Gueldner filed separate Motions for a New Trial.

In our determination of some of the bills of exceptions, supra, we ruled on certain contentions contained in the Motions for a New Trial and found that they

were without merit. We have now considered all of the remaining allegations and contentions of the Motions for a New Trial and find that they set forth nothing new for our consideration. All matters urged and not abandoned in this Court were discussed in the bills of exceptions, supra.

For the reasons assigned, the convictions and sentences are affirmed.

McCALEB, J., concurs in the decree, being now convinced as to Bill No. 29 that, with the exception of State v. Gunter, 180 La. 145, 156 So. 203, the jurisprudence of this Court is well settled that the judge is obliged to give a charge on conspiracy in prosecutions for a crime committed by two or more persons.

HAMITER, J., dissents, he adhering to the written reasons assigned by him on the original hearing.

APPENDIX B.

ARTICLE 292—WEST'S CODE CRIMINAL PROCEDURE.

"Before the finding of an indictment or the filing of an information the court, on request of the state or the defendant, *shall* immediately order a preliminary examination in felony cases.

After the finding of an indictment or the filing of an information an order for a preliminary examination may be granted by the court at any time, either on its own motion or on request of the state or the defendant." (Emphasis added.)

Note: Article 295 of the Louisiana Code of Criminal Procedure provides that any evidence taken at a preliminary hearing may be later used at trial if a witness is ill, absent or deceased.